

RESPONSE FROM BAS BABIES COUNSEL: RESPONSE REQUIRED - Amended Complaints and ARCOS Data

Celeste Brustowicz

Wed 6/12/2019 8:50 AM

To: PWeinberger@spanglaw.com <PWeinberger@spanglaw.com>; Sheila Schebek <SMS@spanglaw.com>;

Cc: Stephen Wussow <swussow@sch-llc.com>; Stuart H. Smith <ssmith@sch-llc.com>; Barry J. Cooper, Jr. <bcooper@sch-llc.com>; Kevin Thompson (kwthompsonww@gmail.com) <kwthompsonww@gmail.com>; Scott R. Bickford <srb@mbfirm.com>; Spencer Doody (sdoody@mbfirm.com) <sdoody@mbfirm.com>;

📎 2 attachments (61 KB)

List of Cases Where Defendants are not in ARCOS Data.docx; ATT00001.htm;

Mr. Weinberger:

We (counsel for NAS babies) have never received Arcos data despite requested requests.

Thus, we are filing a motion for leave to file a motion to obtain this data. Please send us notice of the court hearing you reference as we received no such notice.

As soon as we are supplied the data, we will review and adjust our complaints accordingly.

Begin forwarded message:

From: Sheila Schebek <SMS@spanglaw.com>

Date: June 12, 2019 at 3:11:02 PM GMT+2

To: Undisclosed recipients;;

Subject: Opiate Litigation: RESPONSE REQUIRED - Amended Complaints and ARCOS Data

**** External Email - Exercise caution before clicking links or opening attachments. ****

To All PEC Members and Counsel of Record in the attached list of cases:

Per the email below and the attached spreadsheet, a number of defendant distributors are complaining that you filed cases against Distributors where defendants claim that they did not do business and/or the ARCOS data demonstrates that they did not supply pills to your clients' venue.

There may be reasons why you sued these distributors. Perhaps our ARCOS data contradicts what these defendants are claiming. Or you have other reasons such as reliance on IQVIA data or migrating pills theory.

I am sure this issue will be raised with Judge Polster next week and so I need your response/explanation as soon as possible.—Pete

Peter H. Weinberger

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From: Moore, Kelly A. [<mailto:kelly.moore@morganlewis.com>]

Sent: Tuesday, June 11, 2019 1:22 PM

To: Peter H. Weinberger

Cc: 'xALLDEFENDANTS-MDL2804-Service'

Subject: FW: Amended complaints and ARCOS data

It was me, Pete. Here it is.

Kelly A. Moore

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From: Moore, Kelly A. <kelly.moore@morganlewis.com>

Date: Friday, Jun 07, 2019, 6:32 PM

To: Peter H. Weinberger <PWeinberger@spanglaw.com>

Cc: jhaggerty@foxrothschild.com <jhaggerty@foxrothschild.com>, jmmajoras@jonesday.com <jmmajoras@jonesday.com>, tmtabacchi@jonesday.com <tmtabacchi@jonesday.com>, tjohnson@cavitch.com <tjohnson@cavitch.com>, jmatthews@foley.com <jmatthews@foley.com>, kkoski@foley.com <kkoski@foley.com>, rbarnes@marcus-shapira.com <rbarnes@marcus-shapira.com>, Nortey, James A. <james.nortey@morganlewis.com>, McEnroe, Elisa P. <elisa.mcenroe@morganlewis.com>, Lavelle, Jr., John P. <john.lavelle@morganlewis.com>, Gabriele Wohl <gwohl@bowlesrice.com>, Montminy, Brandan <Brandan.Montminy@lockelord.com>, Jones, Scott <sjones@lockelord.com>, Fincher, Lauren <LFincher@lockelord.com>, Matsoukas, Kathleen <Kathleen.Matsoukas@btlaw.com>, Leeder, Bill <Bill.Leeder@btlaw.com>, Hahn, William <William.Hahn@btlaw.com>, Barnhard, Dean <Dean.Barnhard@btlaw.com>, Harton, Oni <Oni.Harton@btlaw.com>, Padgett, William <William.Padgett@btlaw.com>, McDonald, John P. <jpmcdonald@lockelord.com>, 'xALLDEFENDANTS-MDL2804-Service' <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>

Subject: Amended complaints and ARCOS data

Pete:

As you know, on November 2, 2018 you filed a motion seeking leave to extend the time to file amended complaints so that the PEC could distribute ARCOS reports showing which distributors had 5% or more of the market share in each jurisdiction. You represented to the Court that the additional time to create and disseminate those 5% ARCOS reports was necessary to avoid “naming of hundreds of additional defendants with *de minimus* market share in more than a thousand amended complaints.”

On November 16, 2018, the Court granted that motion, permitting the PEC to create and disseminate the reports and extending the time to file amended complaints to March 16, 2019.

The extension to amend the complaints was expressly tied to the use of the information in the PEC’s market share ARCOS reports: “Plaintiffs in MDL cases may then use this information to amend their complaints and must do so on or before March 16, 2019.”

Despite the clear wording of the Court’s order, many Plaintiffs flagrantly disregarded it by filing short form complaints that expressly note that the named defendant is NOT in the ARCOS data. And in other cases, plaintiffs claim the defendant is in the ARCOS data when that is not correct.

As we discussed in Cleveland a couple of weeks ago, Rite Aid has been named in at least 146 such complaints -- 77 cases in states where Rite Aid never did business and another 69 cases where plaintiffs expressly admit that Rite Aid is not in the ARCOS data in the certification accompanying the short-form complaint. A number of other defendants are facing the same problem, including Kroger (at least 155 complaints); Walmart (at least 153); Anda (at least 103); Smith Drug Co. (at least 13); H.D. Smith (at least 4); and HBC and DDM (at least 1). This issue may be affecting other distributors too, but I have spoken to only the distributors who were in the room when this came up and Kroger because they were about to file another motion on this topic.

When we spoke about this with Special Master Cohen in Cleveland, you indicated that you could address and correct the issue on behalf of the PEC if we provided you with a list of cases and the names of Plaintiffs’ counsel. Attached for your convenience is such a list. We appreciate your assistance with getting these cases dismissed as soon as possible.

The attached list includes only those cases in jurisdictions where the defendants did no business and are not in the ARCOS data at all. The PEC’s motion and Court’s order intended for distributor defendants with less than 5% of the market share, *i.e.*, *de minimus* market share, to be excluded from the amended complaints. We have never been provided with a copy of your ARCOS reports with those market share numbers but suspect we have been named in hundreds of additional cases where our market share did not meet that threshold. We therefore also request that you please provide us with a copy of the reports so that we can provide you with a second list of cases that includes those cases. Access to the reports is important for the additional reason that in many instances Plaintiffs stated in the short-form complaints that the defendant was in the ARCOS data when that is not correct. For example, certifications accompanying over 60 of the Rite Aid cases listed in the attached list state that Rite Aid is in the ARCOS data even though Rite Aid never did business in that entire state. That could be because Plaintiffs’ counsel ignored the information in the reports or because the reports are wrong. Either way, it would be very helpful for us to get access to the reports so we can help you correct it.

Please let me know if you have any questions.

Best, Kelly

Kelly A. Moore

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